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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RYAN JOHNSON,

Defendant and Appellant.

F077424

(Super. Ct. No. DF012900A)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. David Wolf, Judge.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Barton Bowers, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Smith, Acting P.J., Meehan, J. and Snauffer, J.

## **INTRODUCTION**

Pursuant to a plea agreement, appellant Ryan Johnson pled no contest to one felony count of violating Penal Code<sup>1</sup> section 4573.8, possession of drugs or alcohol in a state prison, in this case, marijuana. Johnson contends that section violates equal protection, in that possession of other contraband in a penal institution that is otherwise not illegal, is a misdemeanor. He also asks this court to review personnel records and determine whether the trial court properly denied discovery of those documents. We affirm.

## **FACTUAL AND PROCEDURAL SUMMARY**

Because Johnson pled no contest, the facts of the offense are taken from the prison incident report. On Saturday, December 31, 2016, Correctional Officer Monica Duran saw Johnson moving repeatedly between cells 202 and 204. Duran completed a clothed body search of Johnson, locating three small bindles each containing a green leafy substance, in Johnson's coat pocket. On February 2, 2017, lab results confirmed the green leafy substance to be marijuana. The contents of only one of the three bindles was weighed; the weight without packaging was 0.365 grams.

The Kern County District Attorney filed a complaint on June 16, 2017, charging Johnson with one count of violating section 4573.6, possession of a controlled substance in a penal institution. The complaint also included the allegation that Johnson previously was convicted of a serious or violent felony, section 211, robbery. Initially, Johnson pled not guilty and denied the allegation.

On September 19, 2017, Johnson filed a motion to disclose personnel records pursuant to Evidence Code section 1043.<sup>2</sup> He sought the personnel records of Duran.

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<sup>1</sup> References to code sections are to the Penal Code, unless otherwise specified.

<sup>2</sup> This is commonly referred to as a *Pitchess* motion. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.)

The Attorney General opposed the motion. The trial court conducted an in camera review of documents sought in the *Pitchess* motion.

On September 28, 2017, Johnson filed a motion to reduce the charged offense to a misdemeanor on the grounds of equal protection. The motion alleged that after passage of Proposition 64, possession of small amounts of marijuana by a person over 21 years of age and not in prison was not a crime. Johnson argued that possession of small amounts of contraband in prison was generally treated as a misdemeanor and the possession of a small amount of marijuana in prison should be considered a misdemeanor. The district attorney filed opposition to the motion.

The trial court denied both of Johnson's motions on December 27, 2017.

On March 21, 2018, the district attorney amended the complaint to allege a second count, a violation of section 4573.8, unauthorized possession of drugs or alcoholic beverages in prison. A prior serious or violent felony conviction also was appended to this count.

Additionally, Johnson signed a felony advisement, waiver of rights, and plea form on March 21, 2018. Johnson agreed to plead no contest to the count 2 offense, a violation of section 4573.8, and admit the prior conviction enhancement, in exchange for a sentence of 32 months, to be served consecutively to the term for which Johnson currently was incarcerated.

At the March 21, 2018 hearing, the trial court verified that Johnson had reviewed the plea form with his attorney, and understood his constitutional rights and possible defenses to the charges. The parties stipulated to a factual basis for the plea. The trial court accepted Johnson's no contest plea to the count of violating section 4573.8 and his admission to having a strike prior within the meaning of section 667, subdivision (e). On motion of the district attorney, the count 1 charge and enhancement were dismissed.

On April 23, 2018, Johnson was sentenced in accordance with the plea agreement. Johnson filed a notice of appeal on April 25, 2018, and his request for a certificate of probable cause was granted.

## **DISCUSSION**

In this appeal, Johnson argues that possession of less than an ounce of marijuana is not a criminal offense in California and, therefore, possession of marijuana in prison cannot fall within the purview of section 4573.6 or similar statutes. He argues that possession of less than an ounce of marijuana in a penal institution should be treated as a misdemeanor, like possession of other contraband in prison that is otherwise not illegal to possess. He also asks this court to review the *Pitchess* documents and determine whether the trial court erred in not disclosing any documents to the defense.

### **I. Challenge to Felony Conviction is Cognizable**

Johnson pled no contest to a violation of section 4573.8, unauthorized possession of drugs or alcoholic beverages in prison. Section 4573.8 provides that any person who knowingly has in his or her possession in a prison, jail, or other enumerated facility, drugs or alcoholic beverages without being authorized to possess the same by rules of the Department of Corrections or by the person in charge of the facility, is guilty of a felony. Section 4573.8 also provides that the prohibitions and sanctions set forth in this section “shall be clearly and prominently posted outside of, and at the entrance to, the grounds of all detention facilities.”

The People contend Johnson’s equal protection argument, specifically that the offense to which he pled should be treated as a misdemeanor, is not cognizable on appeal.

### ***Effect of No Contest Plea***

When a defendant changes his or her plea to guilty or no contest, the plea is deemed to constitute a judicial admission of every element of the offense charged. It serves as a stipulation that the People need not introduce proof to support the accusation.

“[T]he plea ipso facto supplies both evidence and verdict.” (*People v. Voit* (2011) 200 Cal.App.4th 1353, 1363 (*Voit*).)

“Under section 1237.5, a defendant may appeal from a conviction on a plea of guilty or no contest only on grounds going to the legality of the proceedings; such a plea precludes appellate consideration of issues related to guilt or innocence, including the sufficiency of the evidence ....” (*People v. Palmer* (2013) 58 Cal.4th 110, 114.) To appeal after conviction by plea of guilty or no contest, a defendant must obtain a certificate of probable cause and the cognizable issues are limited to those based on reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings resulting in the plea. The issuance of a certificate of probable cause does not operate to expand the grounds upon which an appeal may be taken. Among the issues that can be raised after a guilty plea or a plea of no contest is whether a defendant knowingly, voluntarily, and intelligently waived his or her rights in entering the plea. (*Voit, supra*, 200 Cal.App.4th at p. 1364.) A defendant also may assert that his or her admission included a legal impossibility. (*Id.* at p. 1365.)

We note that Johnson pled to a felony violation of section 4573.8. Because he obtained a certificate of probable cause, Johnson may raise constitutional challenges to the jurisdiction of the court or legality of the proceedings. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1178.) By arguing that equal protection precludes a felony conviction under these facts, he is arguing part of his plea bargain is illegal. (*People v. Young* (2000) 77 Cal.App.4th 827, 832.) Having obtained a certificate of probable cause, Johnson is permitted to raise this issue. (*Id.* at p. 833.)

## **II. Equal Protection**

Johnson contends that because possession of less than an ounce of marijuana after passage of Proposition 64 is no longer a crime, possession of marijuana no longer falls within the purview of section 4573.6 or similar statutes, including presumably section 4573.8, to which he pled.

## ***General Principles***

Both the federal and state Constitutions include equal protection guarantees. “No State shall ... deny to any person within its jurisdiction the equal protection of the laws.” (U.S. Const., 14th Amend., § 1.) Similarly, article I, section 7, subdivision (a) of the California Constitution provides: “A person may not be ... denied equal protection of the laws ....” The equal protection clause has been summarized as “essentially a direction that all persons similarly situated should be treated alike.” (*City of Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 439.)

The elements of an equal protection claim have been addressed by the California Supreme Court:

“ ‘The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.’ [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but ‘whether they are similarly situated for purposes of the law challenged.’ ” (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253 (*Cooley*).)

When a showing has been made that two similarly situated groups are treated disparately, the next element of a meritorious equal protection claim concerns whether the government had a sufficient reason for distinguishing between the two groups. (*In re Brian J.* (2007) 150 Cal.App.4th 97, 125.) Whether the government had a sufficient reason to treat the groups disparately is tested using one of three different standards.

First, where a statute or regulation makes distinctions involving inherently suspect classifications or fundamental rights, it is subject to *strict scrutiny* and may be upheld only if the government establishes the distinction is necessary to achieve a compelling state interest. (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 480 (*Kasler*).) Second, distinctions based on gender are subject to an *intermediate* level of review. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200.) Third and most commonly, the challenged distinctions must bear a rational relationship to a legitimate state purpose. (*Ibid.*) Stated

otherwise, this latter standard requires the statute or regulation to be upheld if there is any reasonably conceivable set of facts that provides a *rational basis* for the classification. (*FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 313.)

Under the rational basis test, the party challenging the statute or regulation must demonstrate that the disparity in treatment is unrelated to the achievement of any legitimate government purpose. (*Kasler, supra*, 23 Cal.4th at p. 480.) Thus, application of the rational basis test involves a strong presumption favoring the validity of the challenged statute or regulation. (*Ibid.*)

### ***Application of Principles***

Johnson must first establish that two similarly situated groups are treated disparately in order to establish an equal protection claim. (*Cooley, supra*, 29 Cal.4th at p. 253.) No such showing has been made.

The thrust of Johnson's claim is that Proposition 64 decriminalized the possession of small amounts of marijuana for those 21 years of age or older and that Proposition 64 should be interpreted as affecting sections 4573.6 and 4573.8. Approved by voters on November 8, 2016, and effective November 9, 2016, Proposition 64 enacted Health and Safety Code section 11362.1 and made it lawful for persons 21 years of age or older to possess, transport, purchase, give away, or obtain not more than 28.5 grams of cannabis not in concentrated form. (Health & Saf. Code, § 11362.1, subd. (a)(1).) Generally, however, use is not permitted in any public place or where use of tobacco is prohibited; use or possession is not permitted on the grounds of any school, day care center, or youth center; and use and possession of an open container of cannabis is not permitted while driving, operating, or riding as a passenger in any vehicle, vessel, or aircraft. (Health & Saf. Code, § 11362.3.)

Furthermore, Health and Safety Code section 11362.45 was also added by Proposition 64 and specifically states that Health and Safety Code section 11362.1 does not amend, repeal, affect, restrict or preempt:

“(d) Laws pertaining to smoking or ingesting cannabis or cannabis products on the grounds of, or within, any facility or institution under the jurisdiction of the Department of Corrections and Rehabilitation or the Division of Juvenile Justice, or on the grounds of, or within, any other facility or institution referenced in Section 4573 of the Penal Code. [¶] ... [¶]

“(g) The ability of a state or local government agency to prohibit or restrict any of the actions or conduct otherwise permitted under Section 11362.1 within a building owned, leased, or occupied by the state or local government agency.” (Health & Saf. Code, § 11362.45, subs. (d) and (g).)

Moreover, section 4573.8 was not amended by Proposition 64 and all presumptions are against repeal by implication. (*People v. Park* (2013) 56 Cal.4th 782, 798.) Johnson has failed to cite authority that Proposition 64 intended to affect sections 4573.6 or 4573.8, and Health and Safety Code section 11362.45 indicates the contrary.

Additionally, the “first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.” (*Cooley, supra*, 29 Cal.4th at p. 253.) The “inquiry is not whether persons are similarly situated for all purposes, but ‘whether they are similarly situated for purposes of the law challenged.’ ” (*Ibid.*) Here, all persons are treated the same under the law challenged by Johnson.

Section 4573.8 does not apply just to prisoners; it applies to all persons. Section 4573.8 makes it a felony for “any person” to possess drugs or alcoholic beverages in prison. It is a general statute, applying to visitors, correctional officers, and inmates. (*People v. Clark* (1966) 241 Cal.App.2d 775, 778; *People v. Trout* (1955) 137 Cal.App.2d 794, 795-796 [both addressing the language “any person” in § 4573.6].) Consequently, Johnson has failed to establish that he is treated differently from any

group; all persons are subject to felony charges for possessing alcohol or drugs on prison grounds.

Even with agreed with Johnson's claim that disparate treatment with respect to marijuana is afforded prisoners aged 21 or older compared to the general population of the same age group, his equal protection challenge would still fail. Prisoners are not a suspect class for purposes of equal protection. (*Webber v. Crabtree* (9th Cir. 1998) 158 F.3d 460, 461.) As such, we uphold the statute or regulation if there is any reasonably conceivable set of facts that provides a *rational basis* for the classification. (*FCC v. Beach Communications, Inc., supra*, 508 U.S. at p. 313.) Johnson, as the party challenging the statute, must demonstrate that the difference in treatment is unrelated to the achievement of any legitimate government purpose. (*Kasler, supra*, 23 Cal.4th at p. 480.)

Johnson has not, and cannot, demonstrate that any disparate treatment is unrelated to a legitimate government purpose. Here, there is a rational basis for treating adults 21 years of age or older in prison differently than the general population. Sections 4573.6 and 4573.8 serve the necessary purpose of prison administration, including maintenance of prison discipline and order, and prevention of disruption and violence. (See *People v. Clark, supra*, 241 Cal.App.2d at p. 779.) Health and Safety Code section 11362.1 has no application inside prison walls; it regulates cannabis use in the general population by allowing adults 21 years of age or older to possess and use marijuana, much like alcohol.

Furthermore, Johnson seems to claim that equal protection demands possession of cannabis in prison be treated the same as other forms of contraband in prison. Sections 4573.6 and 4573.8 establish that possession of drugs, alcohol, or any controlled substance in prison is a felony. This is true regardless of whether the substance is lawful to possess outside prison walls, for example alcohol by those 21 years of age or older.

Johnson also mentions, in passing, Proposition 47's enactment on November 4, 2014, and that it reduced certain felonies, including drug and theft related offenses, to

misdemeanors. Proposition 47, however, did not include the offenses set forth in sections 4573.6 or 4573.8 among those offenses that were reduced to a misdemeanor. (*People v. Contreras* (2015) 237 Cal.App.4th 868, 890; Voter Information Guide, Gen. Elec. (Nov. 4, 2014) analysis of Prop. 47 by Legis. Analyst, pp. 34-37.)

Moreover, violations of Penal Code sections 4573.6 or 4573.8 cannot be viewed as lesser offenses of the Health and Safety Code offenses in sections 11350, 11357, and 11377. An offense is necessarily included in another if the greater offense cannot be committed without committing the lesser because all the elements of the lesser offense are included in the elements of the greater. (*People v. Clark* (1990) 50 Cal.3d 583, 636.) Sections 4573.6 and 4573.8 require the act of possession in a penal institution; possession in the confines of a penal institution is not an element of any of the Health and Safety Code offenses affected by Propositions 47 or 64.

The equal protection clause does not make every minor difference in the application of laws to different groups a violation of the United States Constitution. (See, e.g., *Nevada Department of Human Resources v. Hibbs* (2003) 538 U.S. 721, 735-736; *Williams v. Rhodes* (1968) 393 U.S. 23, 30.) Treating prisoners differently from those in the general population is permissible without violating equal protection. (See, e.g., *In re Smith* (2008) 42 Cal.4th 1251, 1269-1270 [prisoners can be treated differently from the general population for purposes of civil commitment and not violate equal protection].)

The prosecution of Johnson for possessing cannabis in prison did not discriminate based on a suspect classification and did not violate equal protection principles. Consequently, Johnson's challenge to his plea as a violation of equal protection fails.

### **III. Pitchess Motion**

Johnson asks this court to review the documents reviewed by the trial court in response to his *Pitchess* motion and independently determine whether the trial court erred in not disclosing any documents to the defense. With a plea of no contest to the section 4573.8 offense, the cases differ on whether discovery issues are appealable, even with a

certificate of probable cause. Some courts are of the view that because discovery motions do not raise an issue going to the legality of the proceedings, unless a suppression motion was filed, an appellant who pled guilty or no contest is precluded from challenging a discovery ruling. (See, e.g., *People v. Hunter* (2002) 100 Cal.App.4th 37, 42-43.) Other courts have permitted challenges to discovery rulings to be made on appeal, with a certificate of probable cause. (See, e.g., *People v. Moore* (2003) 105 Cal.App.4th 94, 97-101 [claim of discriminatory enforcement of prison regulations implicates constitutional principles that would require dismissal regardless of the defendant's guilt].)

Here, Johnson filed his *Pitchess* motion before he filed his motion to reduce the offense to a misdemeanor on equal protection grounds. Johnson did not file a section 1538.5 suppression motion. However, because of the split of authority on whether this issue may be raised, we have independently reviewed the documents.

The augmented reporter's transcript was filed on March 6, 2019. This transcript reflects that the trial court reviewed the documents produced by the custodians of records and noted each document reviewed, made inquiries of the custodians of records, and determined there were no discoverable personnel records. We conclude from our independent review the trial court did not err, or abuse its discretion, by not releasing any of the documents to the defense. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1221.)

### **DISPOSITION**

The judgment is affirmed.